

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Cecil E. and Jane T. Bartholomew

95-01656

Name of Respondents

Merrill Lynch Pierce Fenner & Smith Inc
Mathew Fitzgerald

REPRESENTATION

For Claimants Cecil E. and Jane T. Bartholomew ("claimants") appeared Ward W. Westerberg, Esq. of the law firm Johnson, Peterson, Tener & Anderson located in Jamestown, New York.

For Respondents Merrill Lynch Pierce Fenner & Smith Inc. ("Merrill Lynch") and Mathew Fitzgerald ("Fitzgerald"), (collectively referred to as "respondents") appeared Richard T. Sullivan, Esq. of the law firm Sullivan, Benatovich, Oliverio & Trimboli located in Buffalo, New York.

CASE INFORMATION

The Statement of Claim was filed on April 4, 1995.

Claimant's Submission Agreement was signed on March 21, 1995.

A Joint Statement of Answer was filed by the respondents on June 2, 1995.

Respondent Merrill Lynch's Submission Agreement was signed on June 2, 1995.

Respondent Fitzgerald's Submission Agreement was signed on May 23, 1995.

HEARING INFORMATION

Hearing Date/Sessions:

May 30, 1996

1 Session

The hearing was held at the Hyatt Regency located in Buffalo, New York.

CASE SUMMARY

Claimants alleged that respondent Fitzgerald a broker at Merrill Lynch purchased and sold holdings in their account without authorization. Claimants alleged that respondents sold investments they wished to hold on to and purchased investments they did not wish to purchase. Claimants further alleged that they complained about the unauthorized activity in their account to Merrill Lynch but that Merrill Lynch denied liability.

Claimants also asserted that on October 11, 1994, they directed respondent Merrill Lynch to reposition their portfolio to something more compatible with their desires and to correct the unauthorized trade situation. In so doing, Claimants maintained that they allowed a few trades made to remain in effect in order to simplify correcting a difficult situation and avoid short-term profits with tax consequences. Claimants contended that such a determination on their part did not mean the unauthorized trades by respondent Fitzgerald were approved.

Respondents denied any and all allegations of wrongdoing or liability in claimant's claim for damages. Respondents maintained that on August 30, 1994, claimant met with respondent Fitzgerald indicating that he was unhappy with the advice he was receiving from his Financial Consultant. Respondents further maintained that respondent Fitzgerald recommended an Asset Power Account for the claimants after reviewing their portfolio and prior trading activity. Respondents also maintained that respondent Fitzgerald and Claimants reviewed each investment in their account. Respondents contended that Claimants agreed with respondent Fitzgerald's recommendations and that the sales would be executed that day and the stock purchases would be made the following day after the proceed realized on the sales were calculated.

Respondents maintained that respondent Fitzgerald explained to Claimants that he would be leaving on vacation for three weeks and that claimant's agreed that their questions could wait until his return. Respondents also maintained that all the trades alleged took place in an Asset Power Account, which imposes a flat, quarterly fee to investors, and that respondent Fitzgerald did not benefit from executing these trades.

RELIEF REQUESTED

Claimants requested entry of an award in their favor against respondents Merrill Lynch and Mathew Fitzgerald jointly and severally, in the amount of \$10,072.84, representing the money lost as a result of respondents unauthorized trades, plus interest and attorneys' fees.

Respondents requested that the Statement of Claim be dismissed in its entirety.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Merrill Lynch Pierce Fenner & Smith, Inc. and Mathew Fitzgerald be and

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hereby are liable and shall pay Claimants Cecil E. and Jane T. Bartholomew the sum of \$6,512.48.

2. Respondents Merrill Lynch Pierce Fenner & Smith, Inc. and Mathew Fitzgerald are jointly and severally liable and shall pay claimants \$300.00 to reimburse claimants for the hearing session deposit paid to the NASD.
3. Claimants request for attorney's fees be and hereby is denied.
4. All other claims be and hereby are denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, The Arbitrator has determined that the NASD shall retain the \$100.00 non-refundable filing fee previously deposited by claimants and the \$300.00 hearing session deposit as full consideration for the hearing in this matter.

NASD ARBITRATION NUMBER 95-01656

CECIL E. and JANE T. BARTHOLOMEW (v.) MATTHEW FITZGERALD and
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

DECISION

The Claimants Cecil E. Bartholomew and Jane T. Bartholomew seek damages from the Respondents Matthew Fitzgerald and Merrill Lynch, Pierce, Fenner & Smith, Inc. in the amount of \$10,072.84 alleging unauthorized trades in their account.

The trades in question were made shortly after a meeting between Cecil E. Bartholomew and Matthew Fitzgerald at the Merrill Lynch office in Jamestown, New York on August 30, 1994. The securities purchased in the account were in keeping with the Claimants' investment objectives and no proof was offered that these specific trades benefited the Respondents directly in extra commissions.

While this case presents a close question of fact, a number of factors tip the balance of creditability in favor of the Claimants. These factors include: Cecil E. Bartholomew's previous custom of not purchasing any security until he conducted independent research, the failure of the Respondents to provide any copies of research work done by Merrill Lynch on the purchased securities, the failure of the Respondents to adequately consider the tax consequences of all of the transactions and the improper labeling of some of the transactions as "unsolicited" on confirmations.

The issue of damages is portrayed in two (2) completely different lights by each party. The \$10,072.84 sought the Claimants are their claimed "costs" for getting out of most of the securities purchased by Merrill Lynch and getting back into most of the securities previously owned. On the other hand, the Respondents claim that the Claimants' portfolio was worth more at the end of September 1994 than it was at the end of August 1994, and that the Claimants suffered no damage. Neither of these approaches to damages is acceptable. The value of the portfolio was \$105,234.10 as of August 26, 1994. In September, the Claimants earned \$3,071.74 in income. During October, the Claimants earned \$81.74 in income and wrote a \$1,000 check out of their C.M.A. account. The value of the portfolio was \$100,874.10 at the end of October 1994. Adjusting for the earned income and the C.M.A. check, the Claimants' actual loss is computed to be \$6,512.48. The Claimants are awarded the sum of \$6,512.48 against both Respondents, and the Respondents are directed to pay the costs associated with this proceeding.


PHILIP M. MARSHALL

Date of Decision: July 22, 1996